Supreme Court, U.S.
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No. 00-1853

IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

—v.—

SOREMA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a complaint alleging claims of national origin and age discrimination against an employer was properly dismissed for failure to state a claim pursuant to Rule 12(b)(6), Fed. R. Civ. P., where it made no factual allegations to support a claim of discrimination and relied solely on conclusory allegations?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Sup. Ct. R., respondent states that Sorema, N.A. is wholly owned by Sorema, N.A. Holding Corp. which, in turn, is a privately held Delaware corporation. No publicly held company owns shares in respondent Sorema, N.A.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Sorema, N.A. respectfully requests that this Court deny the petition for a writ of certiorari of petitioner Akos Swierkiewicz seeking review of the summary order and judgment of the United States Court of Appeals for the Second Circuit dismissing his amended complaint.

DECISIONS BELOW

The Second Circuit (Walker, C.J., Oakes, J., and Calabresi, J.) issued an unreported summary order on March 12, 2001 affirming a decision of the United States District Court for the Southern District of New York. The Second Circuit decision appears in the appendix ("Pet. App.") to the petition for a writ of certiorari ("Pet."). *See* Pet. App. 1a-4a.

The District Court's decision was issued orally on July 6, 2000. The transcript of the decision is reprinted in the appendix to the petition. *See* Pet. App. 5a-9a.

STATEMENT OF THE CASE

Rule 8(a), Fed. R. Civ. P., provides that "[a] pleading . . . shall contain . . . a short and plain statement of the claim *showing that the pleader is entitled to relief*" (emphasis added). The Second Circuit and District Court both correctly recognized that the complaint in this action did not provide such a showing, and instead made clear that there was no basis for a claim of discrimination. Plaintiff's arguments to the contrary are erroneous and are premised upon a misapprehension of the lower Courts' decisions and of the controlling law. The Second Circuit summary order does not conflict with decisions of this Court or of other federal courts of appeals, and this case involves nothing more than the application of well-settled pleading rules. As such, it does not warrant this Court's review.

A. The Facts.

The facts set forth below are based on the allegations of plaintiff's amended complaint.[1] Sorema objects pursuant to Rule 15.2, Sup. Ct. R., to plaintiff's "Statement of Facts", because it refers to time-barred events and bare legal conclusions.

Plaintiff was born on July 25, 1946. Although he is of Hungarian descent, he has been a United States citizen for over 30 years. Pet. App. 2a.

Sorema is a reinsurance company with offices in New York City. Sorema hired plaintiff as a senior vice president in 1989, when he was 43 years old. Pet. App. 2a.

In February 1995, Francois Chavel, the president and chief executive officer of Sorema, made organizational changes at Sorema that resulted in a shift of plaintiff's job responsibilities from underwriting to marketing and services. Plaintiff's title remained unchanged. Certain underwriting responsibilities were assigned to Nicholas Papadopoulo, an employee who was 32 years old at the time and is a French national of Greek heritage. Plaintiff claims that Mr. Chavel, who is the same age as plaintiff,

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1 Contrary to plaintiff's assertion, the Second Circuit and the District Court both relied solely on plaintiff's pleading, and did not consider extraneous material. Pet. App. 5a.

commented that he wanted to "energize" the underwriting department. Pet. App. 2a.

In April 1997, more than two years after his job duties were changed, plaintiff wrote a memorandum to Mr. Chavel, announcing that he planned to leave Sorema because he was unhappy with his job and demanding a severance package. The memorandum describes, in detail, plaintiff's grievances with the company, none of which had anything to do with discrimination or plaintiff's age or national origin. Pet. App. 2a-3a.

As a result, plaintiff was given a choice of resigning or having his employment terminated. Plaintiff refused to resign because Sorema would not give him the severance package he had demanded. Consequently, plaintiff's employment was terminated on April 28, 1997. Pet. App. 3a.

B. The Proceedings In The District Court.

1. The Commencement Of The Action.

Plaintiff commenced this action on August 3, 1999 with the filing of a complaint. The complaint contained two claims based on the allegations set forth above, for national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA").

2. Sorema's Motion To Dismiss And The Amended Complaint.

By notice of motion dated February 1, 2000, Sorema moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the complaint on the grounds that the claims (i) are barred by the statute of limitations, and (ii) otherwise fail to state a claim for relief.

In response to Sorema's motion, plaintiff served an amended complaint, based on the same allegations, and adding claims under the New York State Human Rights Law, N.Y. Exec. Law § 292 *et seq.*, and the New York City Human Rights Law, New York City Admin. Code § 8-801 *et seq.*

3. The Oral Decision Of The District Court.

By oral decision and order dated July 6, 2000 (Pet. App. 5a-9a), the District Court granted Sorema's motion and dismissed plaintiff's amended complaint.

The District Court scrutinized the allegations of the amended complaint, including those outside of the applicable limitations period, and concluded that the amended complaint failed to state a federal claim of either national origin or age discrimination. The District Court found that plaintiff had not set forth sufficient facts to support a discrimination claim and relied solely on conclusory allegations. Moreover, the District Court pointed out -- and plaintiff's counsel so admitted at oral argument -- that plaintiff's April 1997 memorandum to Mr.

Chavel negated any inference of discrimination. Accordingly, the District Court dismissed plaintiff's amended complaint.[2]

4. The Judgment And Plaintiff's Post-Judgment Application.

The District Court entered judgment in favor of Sorema on August 1, 2000. Pet. App. 10a.

After entry of judgment, plaintiff made a letter application to the District Court to amend his pleading yet again to add another legal conclusion. Pet. App. 11a-12a.

By order dated August 11, 2000, the District Court denied plaintiff's application, ruling that, "[b]ecause counsel was unable to state any additional facts to be included in an amended complaint, any amendment would be futile". Pet. App. 12a.

C. The Summary Order Of The Second Circuit.

Plaintiff appealed the dismissal of his claims to the Second Circuit.

By summary order dated March 12, 2001, the Second Circuit affirmed the judgment of the District Court. Pet. App. 1a-4a.

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2 The District Court declined to exercise supplemental jurisdiction over plaintiff's state law claims, and dismissed those claims as well. Pet. App. 9a.

The Second Circuit restated the well-settled rule that, "a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". The Second Circuit examined plaintiff's two federal claims in light of this rule. Pet. App. 3a.

The Second Circuit found that plaintiff had made only conclusory allegations and had not pled circumstances that would raise an inference of discrimination. The Second Circuit specifically considered, and rejected, plaintiff's claim that he was being held to a heightened pleading requirement.

Accordingly, the Second Circuit denied plaintiff's appeal.

REASONS FOR DENYING THE WRIT

Pursuant to the rules of this Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons". Sup. Ct. R. 10.

Plaintiff's petition does not present any "compelling reason" for this Court to exercise its discretion to review the Second Circuit decision. The Second Circuit did not depart from this Court's pleading standards nor is there a conflict among circuit courts on the issues presented in the petition. The decisions below correctly applied settled law, and involved issues so straightforward and ordinary that neither the District Court nor the Second Circuit found it necessary to render a formal

published opinion. Accordingly, plaintiff's petition should be denied.

I

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

In assessing whether a petition for a writ of certiorari presents a "compelling reason" for review, this Court considers whether a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court". Sup. Ct. R. 10(c). Although plaintiff asserts that the Second Circuit decision "conflicts with binding precedent of this Court" (Pet. 7), as set forth below, there is no such conflict and the Second Circuit decision simply applies well-settled pleading standards articulated by this Court.

Plaintiff asserts that "[t]he Second Circuit misconceived . . . the applicable standard of review" in dismissing his complaint, and that he had only a "duty . . . to put the defendant on notice of the nature of his action". Pet. 7. Plaintiff further asserts that any requirement that he allege minimal facts from which discrimination may be inferred constitutes a "higher pleading standard than otherwise required by Rule 8(a)(2)". Plaintiff claims that the Second Circuit decision disregarded Rule 12(b)(6), Fed. R. Civ. P., and conflicted with this Court's decisions in *Conley v. Gibson*, 355 U.S. 41 (1957), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Leatherman v. Tarrant County*

Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993). *See* Pet. 7-9.

Plaintiff's assertions are incorrect, and reflect a misunderstanding of this Court's decisions and the nature of notice pleading in federal court. Rule 12(b)(6), Fed. R. Civ. P., provides for dismissal of a pleading for "failure to state a claim upon which relief can be granted". *See also* Rule 8(a), Fed. R. Civ. P. According to the plain language of these rules, a pleading must contain some showing that the plaintiff is entitled to relief.

In *Conley*, this Court held that while "the Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim", what they do "require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is *and* the grounds upon which it rests". *Conley*, 355 U.S. at 47 (quoting Rule 8(a), Fed. R. Civ. P.) (emphasis added). In *Scheuer*, 416 U.S. at 236, this Court applied the standards it set forth in *Conley*, namely that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". And, in *Leatherman*, 507 U.S. at 167 (citation omitted), this Court rejected a "more demanding rule for pleading a complaint under [42 U.S.C.] § 1983 than for pleading other kinds of claims for relief" whereby a plaintiff would be required to "'state with factual detail and particularity the basis for the claim which necessarily includes

why the defendant-official cannot successfully maintain the defense of immunity'".

Taken together, these opinions stand for the now familiar and unremarkable propositions that a complaint must set forth factual allegations and that civil rights claims need not be pleaded with greater detail or specificity than other claims. What they do not mean, and what this Court has never held, is that a complaint may survive a motion to dismiss merely by declaring the ultimate legal conclusion *with no facts whatsoever* to support the conclusion. Indeed, this Court has rejected any such approach, and dismissed a civil rights claim resting upon mere "vague and conclusory" allegations. *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 860 n.27 (1975).

There is thus no question that bare legal conclusions are insufficient to state a claim for relief. *See, e.g.*, 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[1][b], at 12-61 to 12-63 (3d ed. 1999) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss . . . The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure* § 1357, at 340 (2d ed. 1990) ("[T]he pleader must set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist").

The Second Circuit, and the District Court before it, recognized these well-settled principles of pleading and applied them to the case at bar. After careful examination of plaintiff's amended complaint for allegations that could give rise to an inference of national origin or age discrimination, the lower courts correctly found that it contained nothing but bare legal conclusions. *See* Second Circuit decision, Pet. App. 3a ("It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)"); District Court decision, Pet. App. 8a ("[The complaint's] conclusory allegations are insufficient as a matter of law to raise an inference of discrimination"). Although plaintiff may have alleged "what the plaintiff's claim is [*viz.*, national origin and age discrimination]", he did not provide notice of "the grounds upon which it rests". *Conley*, 355 U.S. at 47. The Courts below therefore followed the requirements of notice pleading in dismissing plaintiff's amended complaint.

The decisions are also consistent with the policy underlying notice pleading. As this Court has explained, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome". *Conley*, 355 U.S. at 48. There is certainly no such concern here since plaintiff was afforded ample opportunity to allege some factual basis for his discrimination claims but was repeatedly unable to do so -- as his

counsel so admitted. *See* Pet. App. 7a, 9a, 11a-12a. Thus, his amended complaint was dismissed not because of any "misstep by counsel", but because plaintiff, who was represented by *two* experienced law firms, simply had no basis for his claims.

Furthermore, plaintiff's petition makes clear that his real grievance is not with the pleading standard employed by the Courts below but rather with its application to his particular allegations. Plaintiff argues that the Second Circuit "clearly erred in affirming the dismissal of his lawsuit" because "there clearly were sufficient facts pled in the amended complaint" (Pet. 9 n.4.). Even if plaintiff is correct (which he is not), "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law". Sup. Ct. R. 10. What plaintiff seeks here is another level of review, one that is not available in this Court.

Accordingly, review of this case is not warranted.

II

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In assessing whether a petition for a writ of certiorari presents a "compelling reason" for review, this Court also considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same

important matter". Sup. Ct. R. 10(a). Although plaintiff asserts that the Second Circuit decision "conflicts with precedent from five other courts of appeals" (Pet. 10), as set forth below, there is no such conflict, and even if there were, this case is not an appropriate vehicle for review.

A. There Is No Conflict In The Circuits.

Plaintiff asserts that, "[a]mong the circuit courts, only the Second Circuit has held that an employment discrimination plaintiff must plead the elements of a *McDonnell Douglas prima facie* case to withstand a defense motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure". Pet. 10. Plaintiff's assertion is erroneous, and is based upon a misreading of the Second Circuit decision.

The Second Circuit did not hold plaintiff to the strict elements of a *prima facie* case of discrimination. Rather, it applied the "well settled" rule, which accords with this Court's jurisprudence, that "a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". Pet. App. 3a. Although the Second Circuit consulted *McDonnell Douglas* for general guidance in the discrimination context, it dismissed plaintiff's amended complaint because it offered only naked assertions and conclusory allegations -- not because it failed to allege "proof", as plaintiff would have this Court believe. *See* Pet. 10.

Moreover, the Second Circuit recognized that plaintiff's own allegations show that termination of plaintiff's employment was the result of his own ill-advised actions, and not discrimination. *See* Pet App. 2a-3a. Plaintiff's allegations regarding the circumstances surrounding his departure from Sorema in 1997 -- which *are* factually specific -- demonstrate that national origin and age had nothing to do with the termination of his employment. Thus, while plaintiff argues that "[f]ive times in his amended complaint Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age" (Pet. 9), he fails to appreciate that naked conclusions, even those repeated "[f]ive times", do not negate detailed factual admissions that preclude relief.

The Second Circuit decision does not "conflict[ ] with precedent from five other courts of appeals". *See* Pet 10-11. A critical distinction, and a significant reason that there is no conflict, is that none of plaintiff's cases involved a situation where the complaint admitted the salient facts that bar the plaintiff's claim.

In addition, while certain of the cases identified by plaintiff suggest that it is not necessary to allege the precise *McDonnell Douglas* elements, none of them dispenses with the requirement that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" as required by *Conley* (355 U.S. at 47). As explained by the Ninth Circuit in *Ortez v. Washington County, Oregon*, 88 F.3d 804, 808

(9th Cir. 1996) (emphasis added), "a plaintiff need not make a prima facie showing to survive a motion to dismiss *provided he otherwise sets forth a short and plain statement of his claim showing that he is entitled to relief*". That the plaintiff must make some *showing* of discrimination obviously comports with the pleading standards set by this Court and applied by the Second Circuit in the case at bar.

In each of plaintiff's circuit court cases, the plaintiff was able to do what plaintiff here could not -- provide the defendant with notice of some nonconclusory grounds for his discrimination claim. *See Weston v. Pennsylvania*, 251 F.3d 420, 433 (3rd Cir. 2001) (noting that hostile work environment claim was predicated on "comments, jokes, and jibes of [plaintiff's] co-workers and managers"); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) (noting that race discrimination claims contained "considerabl[e] . . . detail, fleshing out specific claims of both discriminatory failure to promote and discriminatory termination. . . [which] was more than was necessary to constitute the 'short and plain statement' required by Rule 8(a)"); *Bennett v. Schmidt*, 153 F.3d 516, 517-18 (7th Cir. 1998) (holding that race discrimination claim containing "six pages [of] detail" should not be dismissed for "excess length"); *Ortez*, 88 F.3d at 808 (noting that plaintiff made detailed allegations as to "different terms and conditions of employment" for Mexican-American workers including, "new policies regarding performance evaluations and new

policies regarding job duties and the assignment of responsibilities that were directed at him because of his Mexican-American origin"); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 928 (8th Cir. 1993) (holding that race discrimi-nation claim under the Fair Housing Act must plead "at least in general terms, the elements of a Fair Housing Act cause of action"). Thus, there is no conflict between these decisions and that of the Second Circuit in this case.

Finally, plaintiff errs in asserting that the Second Circuit stands alone in using the *McDonnell Douglas* elements as a guidepost to determine if a complaint states a claim of discrimination. The Sixth Circuit has squarely addressed this issue and held that, "[t]o survive the [defendant's] motion to dismiss, [plaintiff's] complaint must include factual allegations that provide direct evidence of a discriminatory motive or that support each element of a *prima facie* case under the criteria set forth in *McDonnell Douglas Corp. v. Green*". *Jackson v. City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999). In *Jackson*, the Sixth Circuit affirmed the dismissal of race discrimination claims because, "[w]ith regard to the *McDonnell Douglas* standard, the district court held that [plaintiff] failed to allege that he suffered an adverse employment action (the third prong) and also failed to establish that similarly situated non-minority employees were treated

differently (the fourth prong)". *Id.* at 752.[3] While the *prima facie* elements provide a useful framework for evaluating the sufficiency of a pleading, there may be situations where a plaintiff may plead discrimination through other means. The case at bar, however, is not one of those situations. To hold otherwise, would permit a plaintiff to proceed with a

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3 Likewise, district courts throughout the country look to the elements of a *prima facie* case under *McDonnell Douglas* in ruling on motions to dismiss discrimination claims. Recently, in *Vizcarrondo v. Bd. of Trustees of Univ. of Puerto Rico*, 139 F. Supp. 2d 198, 203 (D.P.R. 2001) (citation omitted), a district court employed these elements and "conclude[d] that plaintiff has failed to plead enough facts to establish a *prima facie* case under the *McDonnell Douglas* burden shifting framework . . . Therefore, since this Court 'is neither to credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation', plaintiff's Title VII claim must be dismissed". The same approach is followed by numerous other courts. *See Hayes v. Allstate Ins. Co.*, 95 F. Supp. 2d 832 (W.D. Tenn. 2000); *O'Patka v. Menasha Corp.*, 878 F. Supp. 1202 (E.D. Wis. 1995). S*ee also* John F. Buckley & Michael R. Lindsay, *Defense Of Equal Employment Claims* § 17.09, at 17-12 to 17-13 (2d ed. 1995) ("[T]o present a claim of discrimination, a plaintiff must either present direct evidence of discrimination or make out a *prima facie* case of discrimination and rely on the presumption that discrimination occurred. The plaintiff's failure to allege a *prima facie* case in the complaint provides avenue for a motion to dismiss").

discrimination action without any supporting factual allegations and would render meaningless this Court's requirement that a pleading "give the defendant fair notice of what the plaintiff's claim is *and* the grounds upon which it rests". *Conley*, 355 U.S. at 47 (emphasis added).

B. This Case Is Not An Appropriate Vehicle For Review.

A case does not present an important question of federal law, and a writ of certiorari will not be granted, where the circuit court's decision "involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties]". *Powell v. Nevada*, 511 U.S. 79, 86 (1994) (alteration in original). This is precisely such a case.

First, and as mentioned above, the fact-bound nature of this case makes it an inappropriate vehicle to address any issues presented in the petition. Plaintiff's situation is unique in that his own pleading, and the documents incorporated therein, negate any inference of discrimination by showing that plaintiff himself was responsible for his separation from the company. Plaintiff is dissatisfied that he did not receive the severance package that he demanded when he made his decision to leave Sorema. Therefore, this is a case that is limited to its facts.

Second, the Second Circuit decision was delivered in a summary order, which is unpublished and has no precedential value. *See* 2D CIR. R. § 0.23 (Summary orders "shall

not be cited or otherwise used in unrelated cases before this or any other court . . . [s]ince these statements do not constitute formal opinions of the court"). Likewise, the District Court issued its decision orally from the bench and there is no published decision. Therefore, the lower Courts' disposition of plaintiff's claims has no significance to anyone other than plaintiff himself. This is certainly not an appropriate case for which this Court should issue a writ of certiorari.

Accordingly, review of this case is not warranted.

* * *

This Court has cautioned that, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts". *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). None of these factors are present here. Accordingly, the petition should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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